COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3357-CR **Cir. Ct. No. 01-CF-165**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN C. KRUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Ryan C. Krupp appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the circuit court erred when it denied his motion to sever charges against him and when it allowed a gun to be admitted into evidence at trial. He also alleges that his trial counsel was ineffective for failing to

object to the admission of testimony concerning that gun. Because we conclude that the trial court did not err and that Krupp did not receive ineffective assistance of counsel, we affirm.

¶2 Krupp was charged with one count each of possession of LSD with intent to deliver within 1000 feet of a school, maintaining a drug house, possession of marijuana with intent to deliver within 1000 feet of a park, and two counts of obstruction, all as a repeat offender.[1] The charges arose from two incidents which occurred within about a week of each other. The LSD and maintaining a drug house charge both arose from the search of a residence in which Krupp had recently lived. During this search, the police found, among other things, LSD, remnants of marijuana, and materials used to package controlled substances. The police also found a gun. The other charges arose from a vehicle stop. A car in which Krupp was a passenger was stopped for a traffic violation. At some point, Krupp ran from the car and the police. After they stopped him, the police found a bag with marijuana near where he had been. The police found more marijuana and an electronic scale in the car, and a thirty gram brass weight on Krupp.

¶3 Prior to trial, Krupp moved to sever the LSD and drug house counts from the other three counts. The court denied the motion, finding that the evidence was overlapping. The court specifically found that the evidence which supported the charge of maintaining a drug house, particularly involving the packaging of marijuana, and then the evidence that marijuana was subsequently found with Krupp, established a common scheme or plan. The court also found that since there were only two incidents involved, there was little danger of a

[1] Krupp was also charged with one count of mistreatment of animals. This charge was severed from the other charges and is not at issue in this appeal.

cumulative effect of the jury deciding that there were so many incidents that Krupp must have been guilty of them all.

¶4 In a motion for postconviction relief, Krupp challenged the admission into evidence of the gun found during the search of the residence. He also asserted that his trial counsel was ineffective for failing to object to the gun evidence. The court denied the motion, finding that the gun evidence was related to the charge involving the intent to deliver LSD. The court also found that the chance the jury would misuse the evidence in considering the marijuana charge was minimal, and that trial counsel had not been ineffective. Krupp appeals.

¶5 Krupp first argues that the trial court should have severed the charges against him. Appellate review of joinder involves a two-step process. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). The question of whether the initial joinder was proper is a question of law which we review de novo, construing the joinder statute broadly in favor of the initial joinder. ***Id.*** Two or more crimes may be joined if the crimes charged are of the same or similar character, are based on the same act or transaction, or are connected together or constituting parts of a common scheme or plan. ***State v. Hamm***, 146 Wis. 2d 130, 137-38, 430 N.W.2d 584 (Ct. App. 1988). To be of the same or similar character, the crimes must be the same type of offenses occurring over a relatively short period of time, and the evidence as to each must overlap. ***Id.*** at 138.

¶6 When a motion to sever is made, the trial court must consider what, if any, prejudice would result from a trial of the joined offenses. ***Locke***, 177 Wis. 2d at 597. This determination is left to the trial court's discretion. ***Id.*** In order to establish that the trial court misused its discretion in denying a motion to sever, the defendant must establish that the failure to sever caused substantial

prejudice. ***Id.*** "In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant. ***State v. Bettinger***, 100 Wis. 2d 691, 695, 303 N.W.2d 585, 587 (1981). The test for failure to sever thus turns to an analysis of other crimes evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)." ***Locke***, 177 Wis. 2d at 597.

¶7 First, we conclude that the trial court properly joined these counts because the crimes charged were drug-related offenses, and, as the trial court found, the evidence of the crimes overlapped. Further, keeping in mind that nearly all evidence is, to some extent, prejudicial to the party against whom it is offered, ***State v. Alexander***, 214 Wis. 2d 628, 642, 571 N.W.2d 662 (1997), we conclude that the evidence was not unfairly prejudicial.

¶8 As noted, we agree that the charges were properly joined. As his defense to the charges from the search of the residence, Krupp argued that he had moved out of the residence at the time of the search and that the drugs belonged to the people who still lived there. One of those people, however, had complained to the police about drug activity in the residence. She told the police that Krupp had been packaging controlled substances in the house, and that shortly before the raid, he took these substances with him and moved out. Then eight days later, when the police searched the car in which Krupp was riding, the police found marijuana and drug-related evidence. We agree with the trial court's conclusion that this evidence was overlapping.

¶9 The crux of Krupp's argument on appeal is that joinder caused him substantial prejudice. He argues that the overlapping evidence was not essential to the State's case and was unduly prejudicial to him. As discussed previously,

however, the search of the house led to the discovery of material for packaging marijuana. The evidence that the police found marijuana in a car in which Krupp was riding eight days after the search of his former residence, in which material for packaging marijuana was found, helped to establish the charge of maintaining a drug house. Further, the risk of unfair prejudice was diminished by the cautionary instruction given by the court to the jury. The court instructed the jury to consider the evidence on each charge separately and that the number of charges should not affect the verdict.

¶10 The test, in part, for proper joinder is whether the evidence of the charges would be admissible in a trial on only one of the charges. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 210, 316 N.W.2d 143 (Ct. App. 1982). Further, this standard "does not require that every item of evidence relating to one offense be admissible in a separate trial for the other." ***Id.*** at 210 n.10 (citation omitted). Because it helped to support the charges of intent to deliver and maintaining a drug house, we conclude that the evidence from the vehicle search would have been admissible in a trial on the other counts.

¶11 Krupp also argues that the evidence about the gun found during the search of the residence improperly spilled over onto the drug-related charge from the search of the car. The trial court ruled, based on an offer of proof by the State, that guns are often associated with those who deal in drugs. That offer of proof was sufficient to link the gun to the charges stemming from the search of the residence where the gun was found. We agree, as the trial court ruled and the State argues, that the jury would not have associated the gun with the evidence from the search of the car. The State limited its argument about the gun to the residence search. Krupp reinforced this when he argued that the gun was purchased for protection and that he did not commit a crime by possessing a gun.

¶12 Krupp also argues that the trial court erred when it admitted the evidence about the gun. As we have already discussed, the trial court's ruling admitting the gun into evidence was proper for the same reason that joinder was appropriate. The gun was relevant to the intent to deliver and drug house charges. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 533, 302 N.W.2d 810 (1981) (evidence of the presence of guns in the defendant's residence, in conjunction with other evidence of drug trafficking, is relevant to establish possession with the intent to deliver). Krupp argues that the gun was not admissible under ***Thompson v. State***, 83 Wis. 2d 134, 265 N.W.2d 467 (1978). In ***Thompson***, however, the State sought to introduce a gun which had been found in the defendant's possession but was not the gun which had been used in the crime charged. ***Id.*** at 137-38. This is a different situation. The gun here was introduced to support the charge of maintaining a drug house based on the State's offer of proof that people who engage in drug transactions often have guns. This is relevant evidence under ***Wedgeworth***, 100 Wis. 2d at 533.

¶13 Krupp's final argument is that trial counsel was ineffective for failing to object to testimony about the gun.[2] At the ***Machner*** hearing, trial counsel testified that she did not object to this evidence because she believed the court would have found that testimony relevant and admissible.[3] At the hearing, the trial court ruled that it would have admitted the testimony even if the objection had been raised. Based on this, we cannot conclude that Krupp received ineffective assistance of trial counsel. For the reasons stated, the judgment and order of the circuit court are affirmed.

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[2] Counsel did object to the actual admission of the gun.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.